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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 702

SEABOARD & WESTERN AIRLINES, INC.,
Petitioner,

vs.

CIVIL AERONAUTICS BOARD, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND SUPPORTING BRIEF.

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Intervenor,

PAN AMERICAN AIRWAYS, INC.,
Intervenor

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Seaboard & Western Airlines, Inc., respectively shows to this Court:

Statement of the Matter Involved

A. *Background*

Petitioner is an air carrier engaging in international air transportation of property on an irregular or non-scheduled

basis. It is operating under the authority of a Letter of Registration issued by respondent, Civil Aeronautics Board, pursuant to its economic regulations. There is pending before respondent a proceeding in which petitioner is applicant for a certificate of public convenience and necessity authorizing it to conduct international air transportation of property without limitation of frequency or regularity.

Transcontinental & Western Air, Inc., American Overseas Airlines, Inc., and Pan American Airways, Inc. are air carriers engaging in international air transportation of persons, property and mail under certificates of public convenience and necessity. These carriers, as mail certificated carriers, are entitled to and are receiving mail pay pursuant to Section 406 of the Civil Aeronautics Act of 1938, as amended (52 Stat. 998, 49 U. S. C. 486). Petitioner receives no mail pay or subsidy of any kind, and depends entirely upon its commercial revenues for survival.

Petitioner and the above named carriers transport property between points in the United States and points in Europe, and elsewhere. Petitioner transports property over many of the same routes as the above named carriers, and is, therefore, in direct competition with them.

B. *Mail Rate Proceedings Before Respondent*

Section 406 of the Civil Aeronautics Act (52 Stat. 998, 49 U.S.C. 486) empowers and directs respondent to fix and determine, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by air carriers holding certificates authorizing them to transport mail. Among the elements to be considered by respondent in fixing a rate is the need of the air carrier for mail pay sufficient to enable it, under honest, economical, and efficient management, "to maintain and continue the

development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."

In 1946 respondent instituted proceedings to fix mail rates for Transcontinental & Western Air, American Overseas Airlines, and Pan American Airways. At the same time so-called "temporary" rates for these carriers were set, such temporary rates to be paid them pending the adoption of permanent rates. In 1947 and again in 1948 retroactive increases in these temporary rates were awarded by respondent. Upon the initial fixing of or subsequent increase in a temporary rate for a past period, a lump sum is immediately paid to the carrier. Such payments are in fact payments on account, there having been no determination of the actual amount to which the carrier will later be found entitled. The amount paid under temporary rate orders may be greater or less than the amount later authorized in a permanent rate order.

On December 7, 1948, respondent on its own initiative proposed a third increase in the temporary mail rate of Transcontinental & Western Air (80). On December 10, petitioner petitioned for leave to intervene in this proceeding (82). The petition alleged that petitioner had a substantial property and financial interest in the subject matter of the proceeding, that its interest would not be adequately represented by existing parties, and that intervention would not unduly broaden or delay the proceeding. On December 16, respondent denied this petition for leave to intervene (86). On December 22 a *pro forma* hearing was held (89) and on the same day respondent issued an order establishing a new increased temporary mail rate for Transcontinental & Western Air (96). Petitioner instituted proceedings in the United States Court of Appeals

for the District of Columbia to review respondent's order denying petitioner the right to intervene (2).

Petitioner on January 6, 1949, in the case of American Overseas Airlines (124), and on December 10, 1948, in the case of Pan American Airways (198), petitioned for leave to intervene in the rate proceedings of each. Each petition alleged that petitioner had a substantial interest in the subject matter of the proceeding, that its interests would not be adequately represented by existing parties, and that its intervention would not unduly broaden the issues or delay the proceedings. On April 19, 1949, respondent, on its own initiative, proposed a further increase in the rates of both these carriers for the past period January 1, 1946 to December 31, 1948, and proposed to make such increased rates the permanent rates for that period (181, 263). At the same time, respondent directed Pan American Airways and American Overseas Airlines to show cause why these proposed permanent rates should not be immediately adopted as the temporary rate for each (182, 264). Respondent, at the same time, denied petitioner's petitions for intervention so far as each "requests intervention in the temporary mail rates," but granted intervention "as a matter of discretion . . . limited to the final mail rate determination, and then only to such issues as relate to cargo operations and the extent, if any, to which such cargo operations should be underwritten with 'need' mail pay." (185, 266) On April 29, respondent issued orders fixing the proposed increased rates as the temporary rates (193, 277).

Petitioner instituted an action in the United States Court of Appeals for the District of Columbia to review respondent's orders denying it the right to intervene in the temporary rate proceedings and granting only limited intervention in the permanent mail rate proceedings (98). Peti-

tioner subsequently amended its petition to include a review of the orders fixing temporary rates, alleging that respondent committed several errors in determining said rates (286).

C. *Action of the Court Below*

The petition to review the action of respondent in the Transcontinental & Western Air proceeding and the petition to review the action of respondent in the American Overseas Airlines and Pan American Airways proceedings were consolidated for hearing and decision.

On December 27, 1949, the United States Court of Appeals for the District of Columbia affirmed in part and dismissed in part the orders of respondent which had been challenged by petitioner (290). It was held that temporary rate orders were not reviewable because not final, that the orders denying intervention in the temporary rate proceedings were not reviewable for the same reason, and that the award of only limited intervention in the final mail rate proceedings was proper (289).

Jurisdictional Statement

This Court has jurisdiction to review the judgment and decree of the United States Court of Appeals for the District of Columbia by virtue of the following statutory provisions: 28 U.S.C. § 1254 (62 Stat. 928), and § 1006 (f) of the Civil Aeronautics Act of 1938 (52 Stat. 1024; 49 U.S.C. 646).

The petition is timely, the United States Court of Appeals for the District of Columbia having rendered its decision on December 27, 1949 and this petition having been filed on March 25, 1950.

The Questions Presented

1. Whether orders of the Civil Aeronautics Board fixing temporary rates of compensation for an air carrier for

transportation of the mail pursuant to which United States funds are actually paid to that carrier are appealable?

2. Whether orders denying an air carrier the right to intervene in the temporary mail rate proceedings of a competitor are appealable?

3. Whether an air carrier is entitled to intervene in the temporary mail rate proceedings of a competitor?

4. Whether petitioner's status as an air carrier of cargo is such as to entitle it to intervene in the permanent mail rate proceedings of a competitor and to raise therein any questions and present evidence upon any issue relating to the propriety or amount of mail pay to be awarded to such carrier?

5. Whether the Board imposed an undue and improper limitation upon the intervention of petitioner in the mail rate proceedings of other air carriers by limiting its participation to such issues as relate to cargo operations and the extent to which such operations should be underwritten with "need" mail pay?

Reasons for the Allowance of the Writ

1. The United States Court of Appeals for the District of Columbia has decided questions of general importance which have not been, but should be, settled by this Court.

2. The United States Court of Appeals for the District of Columbia has decided questions of substance relating to the construction and application of a statute of the United States which has not been, but should be, settled by this Court.

3. The United States Court of Appeals for the District of Columbia has failed to give proper effect to several applicable decisions of this Court.

These reasons are discussed in petitioner's attached brief.

WHEREFORE your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the District of Columbia, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court of Appeals had in the cases numbered and entitled: *Seaboard & Western Airlines, Inc., Petitioner* v. *Civil Aeronautics Board,* Respondent, Docket No. 10086; and *Seaboard & Western Airlines, Inc., Petitioner* v. *Civil Aeronautics Board,* Respondent, Docket No. 10242, to the end that these causes may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the orders herein of the said United States Court of Appeals for the District of Columbia be reversed by this Court and for such other, further or different relief as to this Court may seem proper.

Dated, Washington, D. C., March 25, 1950.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinion of the Court Below

The opinion of the United States Court of Appeals for the District of Columbia appears in the certified copy of the Transcript of Record (284-289). It has not as yet been officially reported.

Jurisdiction

Reference is made to the jurisdictional statement in the petition (*supra*, p. 5).

Specification of Errors

1. The Court of Appeals erred in deciding that orders establishing temporary mail rates are not appealable.

2. The Court of Appeals erred in deciding that orders denying intervention in temporary mail rate proceedings are not appealable despite the fact that petitioner disclosed a "substantial interest" in the proceedings.

3. The Court of Appeals erred in deciding that orders denying intervention in temporary mail rate proceedings are not appealable despite the fact that the petitioner was concededly entitled to intervene in the permanent mail rate proceedings.

4. The Court of Appeals erred in deciding that petitioner, although he had established a "substantial interest," could not participate fully in the permanent mail rate proceeding and could not present evidence on all issues bearing upon the public interest but was to be limited to "such issues as relate to cargo operations and the extent, if any, to which such cargo operations should be underwritten with 'need' mail pay."

5. The Court of Appeals erred in failing to hold that the Civil Aeronautics Board erred in denying petitioner the right to intervene in the temporary mail rate proceedings of its competitors.

6. The Court of Appeals erred in holding that since the Postmaster General is a party to mail rate proceedings, it is unnecessary and the Civil Aeronautics Act does not require that a person having a substantial interest be allowed to present evidence and argument protecting the public interest.

7. The Court of Appeals erred in affirming the orders of the Civil Aeronautics Board granting petitioner the right of only limited intervention in the permanent mail rate proceedings of Pan American Airways and American Overseas Airlines.

8. The Court of Appeals erred in dismissing the appeal from the orders of the Civil Aeronautics Board fixing temporary rates for Pan American Airways and American Overseas Airlines.

9. The Court of Appeals erred in dismissing the appeal from the orders of the Civil Aeronautics Board denying intervention to Petitioner in the temporary mail rate proceedings of Transcontinental & Western Air, American Overseas Airlines, and Pan American Airways.

The Importance of This Case

The resolution of the issues raised in this case is of great importance to the Civil Aeronautics Board in its administration of the Civil Aeronautics Act, to the aviation industry, and to the American public generally.

Mail pay to certificated air carriers involves an expenditure by this Government of many millions of dollars each year.[1] Without it, a major portion of the aviation industry, as it operates today, might not be able to survive. There is also inherent in mail pay support for one segment of the industry the power to destroy another large segment of the industry which receives no mail pay but nevertheless operates in direct competition with carriers which do.

The importance of questions involving the extent of the power to administer mail pay has already been recognized by this Court when it granted certiorari in the case of *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board,* 336 U. S. 601 (1949) "because of the importance

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[1] "Last year (1948) the air mail bill for our domestic trunk, feeder, and international carriers amounted to approximately $102,000,000. This figure is subject to upward adjustment. In the current year the bill will be higher, perhaps as high as $125,000,000." *Hearings before Committee on Interstate and Foreign Commerce on S. Res. 50,* 81st Cong., 1st Sess. 126 (1949).

of the question to the carriers and the public alike." *Id.* at 603.

I. *Temporary Mail Rate Orders and Intervention Therein*

The Court of Appeals has here decided that temporary rate orders themselves and orders denying intervention therein are not reviewable. Insofar as petitioner can determine, this is the first case in which an air carrier has sought judicial review of such orders of the Civil Aeronautics Board.

The effect of the decision below is to confer upon the Board a degree of discretion not contemplated by the Civil Aeronautics Act, to allow the Board to authorize disbursement of Government funds without adherence to statutory safeguards or standards imposed by Congress, and to preclude persons having a substantial interest in the proceedings from protecting themselves or raising for judicial review questions of public importance.

The Civil Aeronautics Act clearly contemplates development of the aviation industry in the direction of a self-supporting non-subsidized air transport system. *Cf. Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board,* 336 U. S. 601, 606 (1949). It contemplates also the coexistence of subsidized and non-subsidized carriers. *Cf. Flying Tiger Line, Inc.* v. *Atcheson T. & S. F. Ry. Co.,* 75 F. Supp. 188 (S.D. Calif. 1947). It is, of course, to the interest of the subsidized carrier to secure the maximum possible amount of mail pay. It is equally to his non-subsidized competitor's interest and to the interest of the public that such mail pay shall be no more than is essential to enable the subsidized carrier properly to conduct its operations to the extent such operations are found desirable and proper by the Civil Aeronautics Board.

Section 406 of the Civil Aeronautics Act (52 Stat. 998,

49 U.S.C. 486) is the only provision in the Act dealing with the authority and method for fixing rates for the transportation of mail. It provides that the Board is to set the fair and reasonable rate of compensation only after notice and hearing. Among the factors to be considered by the Board is "the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."

Ever since the air transportation pattern for the North Atlantic was established some four years ago (*North Atlantic Route Case,* 6 C.A.B. 319 (1945)) American Overseas Airlines, Pan American Airways, and Transcontinental & Western Air have been operating these routes under so-called "temporary" rates. To date more than $50,000,000 has been paid to these three carriers pursuant to temporary rate orders of the Board (96, 197, 281). As yet no permanent rates for these carriers beyond 1945 have been established.

Nor is the practice of using temporary rates (rates fixed pending a determination of permanent rates which are subject to retroactive adjustments) limited to the international field. Since the practice was first adopted in 1946 (*Essair, Inc., Temporary Mail Rate,* 6 C.A.B. 687 (1946)), it has been in general use in the entire industry. *Hearings before Committee on Interstate and Foreign Commerce on S. Res. 50,* 81st Cong., 1st Sess., 130 (1949).

The Court of Appeals, on the premise that all temporary rates are subject to retroactive adjustment when a perma-

nent rate is fixed (289), held that temporary rate orders and orders denying intervention therein are not final for purposes of judicial review. Such a theory fails to give proper weight to the fact that under such orders funds are in fact disbursed from the public treasury to private parties for their use and benefit.

If rates in excess of those to which a carrier is entitled under Section 406 are paid to such carrier, his non-subsidized competitors will in all probability be placed at a competitive disadvantage. The subsidized carrier may engage in a program to eliminate his non-subsidized competitor and recover the costs of so doing in the form of temporary mail pay. The fact that several years later the Board, when it fixes a permanent rate, or the courts, when the permanent rate order is appealed, may decide that too much mail pay or mail pay for uneconomical or unauthorized operations was paid is of no help to the non-subsidized competitor. By that time he may have been forced out of business or been placed in such a poor competitive position that he cannot regain his old position. Nor is this merely *damnum absque injuria* as in the case of *Alabama Power Co.* v. *Ickes,* 302 U. S. 464 (1938). Section 406 prescribes the standards under which mail rate orders shall be formulated and Section 1006 (52 Stat. 1024, 49 U. S. C. 646) confers upon any person disclosing a "substantial interest" the right to seek judicial review from Board orders. *Cf. Federal Communcations Commission* v. *Sanders Bros. Radio Station,* 309 U. S. 470 (1940).

But the permanent effects of these "temporary" rate orders are not limited to competitors. The American public may also suffer directly from them. Although it may be subsequently determined that excessive temporary mail pay has been disbursed by the Government, recovery of such excess may as a practical matter be impossible. By the time the permanent rate is fixed, the carrier may be

out of business or on the verge of bankruptcy. Or perhaps the financial position and other factors concerning the carrier will be such that to recover the excessive amounts paid in the past will so jeopardize the operations of the carrier that the Board will conclude that it is not in the public interest to recover these amounts.[2] In at least four different mail rate proceedings the Board has found that excessive amounts were paid to carriers, but, despite its ability to do so, it refused to recapture the excessive amounts paid.[3]

II. *The Extent of Intervention in the Permanent Mail Rate Proceedings*

As has already been indicated, Section 1006 of the Civil

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[2] The following remarks of Chairman O'Connell are directly here in point:

> "In many of the cases which are now being processed by the Board's staff, the mail rates are being set for the past 2, 3, or even 4 years. This makes the process of effecting disallowances extremely difficult. The facts themselves surrounding the need of a carrier tend to become blurred with the passage of time. Furthermore, the management of a carrier is obviously in a much more favorable position to defend its past action than the staff of the Board is to attack them.
>
> "Finally, substantial disallowances from the costs which have already been incurred tend to defeat the purpose of the act in that they may so weaken the carrier financially that it is no longer in a position to develop routes and services in the soundest and most expeditious manner." *Hearings before Committee on Interstate and Foreign Commerce on S. Res. 50,* 81st Cong., 1st Sess., 136 (1949).

[3] At first the Board was of the opinion that any excessive payments during the pendency of a rate proceeding should be recaptured. *American Airlines, Inc.—Mail Rate Proceeding,* 3 C.A.B. 323, 325-333 (1942). This policy was soon abandoned, however. In *Pan American-Grace Airways, Inc.—Mail Rates,* 3 C.A.B. 550, 561-562 (1942), the Board found that although over $1,300,000 of excessive mail pay had been paid to the carrier, it would not be in the public interest to recapture this amount. The same decision was reached in *Pan American Airways, Inc., et al., Latin-American Rate Case,* 3 C.A.B. 657, 668-669 (1942) where the excessive amounts paid were over $4,350,000. The Board followed this practice in *Eastern Air Lines, Inc., Mail Rate Proceeding,* 3 C.A.B. 733, 742-743 (1942); and in *American Airlines, Inc., Mail Rate Proceeding,* 3 C.A.B. 770, 776-777 (1942), it vacated its prior order with respect to American's excessive earnings and permitted it to retain the excessive payments already made.

Aeronautics Act confers upon any person disclosing a "substantial interest" the necessary standing to seek judicial review of orders of the Civil Aeronautics Board.

The Court of Appeals correctly stated that: "It is not disputed that one who may appeal may intervene. The Board's Regulations provide for intervention by a person having 'a substantial interest', and in its brief before us the Board states that it has no quarrel with the view that one who may appeal is entitled to participate in the proceeding below." (287)

The Civil Aeronautics Board found that petitioner did not have a substantial interest in the mail rate proceedings of American Overseas Airlines (185) and of Pan American Airways (266), but nevertheless granted petitioner the limited right to intervene in order to participate in those issues concerned with the award of mail pay to support cargo operations (185, 186, 266, 267). The Court of Appeals decided that petitioner, since it was in competition with these carriers for the carriage of freight, did have a substantial interest but that the limited intervention granted was proper (289).

The issue presented to this Court, which, it is submitted, is of sufficient importance for this Court to consider, is this: conceding that a person has disclosed a substantial interest in a mail rate proceeding before the Civil Aeronautics Board, to what extent should he then be permitted to participate in that proceeding.

The question is of importance in the administration of the Civil Aeronautics Act, has not been previously considered by this Court, and the answer given by the Court of Appeals is, it is submitted, in conflict with decisions of this Court.

The coexistence of competing subsidized and non-subsidized air carriers which the Civil Aeronautics Act con-

templates creates a novel situation in the air carrier industry, especially in the international field in which passenger and cargo rates are not subject to direct regulation by the Civil Aeronautics Board. It is apparent that Government subsidy may enable subsidized carriers to eliminate every competing non-subsidized carrier from the industry. The extent to which the losses of subsidized carriers can properly be covered under the Civil Aeronautics Act by mail pay is of vital concern to the non-subsidized carrier. To the extent to which mail pay may be excessive the subsidized carrier is receiving Government funds to which it is not entitled and which enable it to operate on an uneconomical and inefficient basis and to incur losses in conducting its operations which it could not otherwise afford.

Moreover, the mail payments to a subsidized carrier are not earmarked for specific purposes. Consequently, the non-subsidized competitor has a very real concern in the entire mail rate proceeding, not merely in the issues arising in the field in which he may be directly competitive. Using this case as an illustration, although petitioner competes with Pan American only in the carriage of cargo, petitioner is directly affected by the amount of mail pay received by Pan American regardless of the reasons for which it is given. The end result and hence petitioner's interest would be precisely the same whether respondent might award Pan American $10,000,000 to underwrite passenger operations and $2,000,000 to underwrite cargo operations or $12,000,000 to underwrite passenger operations and nothing to underwrite cargo operations.

Underlying the grant to a person with a "substantial interest" of the right to attack or participate in the formulation of orders is the desire to protect the public interest. *Federal Communications Commission* v. *Sanders Bros.*

Radio Station, 309 U. S. 642 (1940). Having established such a substantial interest, a person should therefore be permitted to raise any issue which the agency is required to consider and which will affect the public interest. In the *Sanders Bros.* case, *supra,* although the economic effects upon an existing radio station were not a proper consideration in deciding whether or not to license a new station, this Court allowed the existing station "to appeal and to raise . . . *any relevant question of law in respect of the order of the Commission.*" *Id.* at 477. (Emphasis supplied).

It is submitted that the decision of the Court of Appeals in this case is in conflict with this statement of the Court. By sustaining the Board in granting only limited intervention, petitioner has been precluded from raising all relevant questions regarding the amount of mail pay to be awarded.

Conclusion

The petition for a writ of certiorari should be granted so that this Court may consider the important issues herein presented.

Respectfully submitted,

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